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In the

Supreme Court of the United States

OCTOBER TERM, 1960

No. [redacted] 14

MERCANTILE NATIONAL BANK AT DALLAS,
Appellant,

v.

C. H. LANGDEAU, RECEIVER,
Appellee.

On Appeal From the Supreme Court of the State of Texas

JURISDICTIONAL STATEMENT

MARVIN S. SLOMAN,
HUBERT D. JOHNSON,
Of Carrington, Johnson & Stephens,
1700 Mercantile Bank Building,
Dallas 1, Texas,
Attorneys for Appellant.

WARLICK LAW, INC.—2363 VALDINA STREET—DALLAS—RI 1-6711

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On Appeal From the Supreme Court of the State of Texas

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the Supreme Court of Texas which reversed the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas and affirmed the judgment of the trial court, the 98th District Court in and for Travis County, Texas. This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial federal questions are presented.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Texas is reported at 341 S. W. 2d 161 (Tex., 1960). A copy of this opinion is reprinted herewith as Appendix A. The opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, known as the Austin Court of Civil Appeals, is reported at 331 S. W. 2d 349 (Tex. Civ. App., 1960). A copy of such opinion is reprinted herewith as Appendix B. Copies of the judgment of the trial court, the judgment of the Austin Court of Civil Appeals, and the judgment of the Supreme Court of Texas are reprinted herewith as Appendix C.

JURISDICTION

In 1958 Appellee as Receiver of ICT Insurance Company sued Appellant Mercantile National Bank at Dallas, Republic National Bank of Dallas, and some 242 other defendants. The suit, a tort action for damages, was brought in the 98th District Court of Travis County, Texas, the state court in which the delinquency proceeding against said ICT Insurance Company was pending. Appellant Mercantile National Bank at Dallas, a national bank located at Dallas, Texas, filed a plea of privilege* asserting its claim that as a national bank located at Dallas, Texas it was entitled to be sued in Dallas, Texas under the federal statute relating to venue of actions against national banks. Said Republic National Bank of Dallas filed a similar plea of privilege. Appellee filed a controverting plea to such pleas of privilege,

*The required plea under Texas law and procedure as to change of venue. Rule 86, Texas Rules of Civil Procedure.

claiming the right to maintain such action in the state court in Travis County, Texas against the said two national banks located at Dallas, Texas on the basis of a Texas statute contained in Section 4(f) of Article 21.28 of the Insurance Code of Texas.

Pursuant to Texas practice and procedure a separate hearing and trial was held on such venue right, and by agreement the venue rights of both said national banks were heard and adjudicated in a consolidated trial or hearing. The trial court overruled said pleas of privilege urged by Appellant and by said Republic National Bank of Dallas. Both national banks duly appealed from said trial court's judgments to the Austin Court of Civil Appeals, which intermediate court of appeals consolidated the appeals and disposed of them in a single opinion. In such opinion the Austin Court of Civil Appeals sustained the contentions of the two national banks and entered judgments overruling the contrary judgments of the trial court. Appellee appealed therefrom to the Supreme Court of the State of Texas, which consolidated the cases and disposed of them in a single opinion. The Supreme Court of Texas reversed the judgments of the Austin Court of Civil Appeals and entered judgments affirming the prior judgments of the trial court. Appellant and said Republic National Bank of Dallas duly filed motions for rehearing, and such motions for rehearing were overruled on December 21, 1960. Appellant duly filed its Notice of Appeal with the Clerk of the Supreme Court of Texas on March 16, 1961. Said Repub-

lic National Bank of Dallas filed its Notice of Appeal on March 18, 1961.

Jurisdiction of this appeal is conferred by Section 1257(2) of Title 28 of the United States Code. The judgment by the Supreme Court of the State of Texas is a judgment "rendered by the highest court of a State in which a decision could be had." The entry of the order overruling Appellant's motion for rehearing marked the end of appellate review in Texas on the matter of Appellant's asserted federal venue right involved. The opinions of the Austin Court of Civil Appeals and of the Supreme Court of the State of Texas clearly showed that the question involved was that of whether the Texas statute was repugnant to the federal statute relating to venue of actions against national banks and that the Supreme Court of the State of Texas held in favor of the validity and applicability of the state statute notwithstanding the express provisions of the federal statute on the subject. The only remaining question relates to the meaning and intepretation of the word "final" as it appears in Section 1257(2) of Title 28 of the United States Code.

This Court has held that in determining the existence or non-existence of finality the test is whether "the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court." *Department of Banking, State of Nebraska v. Pink*, 317 U. S. 264, 63 S. Ct. 233, 87 L. ed. 254 (1942); *Gospel Army v. City of Los Angeles*, 331 U. S. 543, 67 S. Ct. 1428, 91 L. ed. 1662 (1947). In the

instant case the Supreme Court of the State of Texas has in fact fully adjudicated rights and such adjudication is not subject to further review by the Texas courts.

In the present case Appellee and the two national banks stipulated and agreed that "the only issue involved in said plea of privilege hearing was the issue of whether the provisions of the federal statutes entitled said Defendants (the two banks) to have said Plaintiff's (Appellee's) action against them transferred to the state court in Dallas County, Texas or whether state statutes on venue of such action were controlling." From the record as a whole and this stipulation and agreement in particular it is quite apparent that in the present case this is the only Federal question that could come to this Court and that it has been finally adjudicated by the highest court in Texas. This Court's assumption of jurisdiction in the present case would not be "to allow review of an intermediate objection" which would "offend the decisive objection to fragmentary reviews." *Radio Station WOW, Inc. v. Johnson*, 326 U. S. 120, 65 S. Ct. 1475, 89 L. ed. 2092 (1945).

Under Texas practice and procedure the ruling on the pleas of privileges is treated as final insofar as it disposes of the issue as to the venue of the case and such ruling has a sufficient element of finality to support a plea of res judicata. *Wichita Falls & S. R. Co. v. McDonald*, 174 S. W. 2d 951 (Tex., 1943). In any further proceedings in the state courts in Texas the finality of the ruling will be fully recognized. A failure to appeal from a trial court's order on

a plea of privilege would be a "waiver of any right to thereafter complain of the same." *Smith Bros. Grain Co. v. Windsor & Stanley*, 255 S. W. 158 (Tex. Com. App., 1923, opinion adopted by Texas Supreme Court). The state law as to the nature and effect of the judgment is highly material insofar as it reveals the incidents and effect of the judgment in its local context.

In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541, 69 S. Ct. 1221, 93 L. ed. 1528 (1949) this Court had occasion to construe the meaning of the word "final" as it appears in Section 1291 of Title 28 of the United States Code. There this Court stated it "has long given this provision of the statute this practical rather than a technical construction." In declining to delay the assumption of jurisdiction this Court pointed out that "when that time comes, it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably." Such practical observations are particularly appropriate in the present case where the right asserted is the right to require that Appellee's action against Appellant be tried in Dallas, Texas rather than in Austin, Travis County, Texas. From a practical standpoint it does not appear to be just or necessary to require that Appellant lose the benefit of its claimed federal right in order for it to arrive ultimately at a point where it can get from the Texas courts to this Court for a determination of whether or not such "lost right" had existed.

The federal right involved in the present case will not be involved in any subsequent proceedings in this cause. As in

Cohen v. Beneficial Industrial Loan Corp., supra, this case involves a "final disposition of a claimed right which is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." The present case is thus different from temporary injunction cases in which the same factual and legal issues would be presented in the subsequent trial or subsequent appeal. Appellate review at the temporary injunction stage would involve piecemeal and fragmentary review. *Montgomery Building & Const. Trades Council v. Ledbetter Erection Company, Inc.*, 344 U. S. 178, 73 S. Ct. 196, 97 L. ed. 204 (1952).

STATUTES INVOLVED

The Texas statute involved in this case is Section 4(f) of Article 21.28 of the Insurance Code of Texas, as amended in 1955. Acts 1955, 54th Leg., p. 737, ch. 267. The text of such statutory provision is reprinted herewith in Appendix D. The federal statute here involved is Section 1 of Chapter 80 of the Act of February 18, 1875, 18 Stat. 320, appearing as Section 94 of Title 12 of the United States Code. The text of such federal statutory provision is reprinted herewith in Appendix D.

QUESTIONS PRESENTED

I. The nature of the rights and privileges conferred on national banks by the provisions of Section 94 of Title 12 of the United States Code.

II. Whether the provisions of said Section 94 of Title 12 of the United States Code are permissive or mandatory.

III. Whether the provisions of Section 4(f) of Article 21.28 of the Insurance Code of Texas or the provisions of said federal statute control as to actions in state courts in Texas against national banks.

STATEMENT OF THE CASE

The pleadings in this case showed clearly that the action is a tort action to recover damages, that Appellant is a national bank located in Dallas, Dallas County, Texas and that Appellee is seeking to maintain the action in a state court in a state district court in and for Travis County, Texas, Appellant not being located in or having a place of business in said Travis County, Texas. By proper pleading duly filed Appellant asserted its claimed right under the federal statute on national banks, 12 U. S. C. §94, to be sued in Dallas, Dallas County, Texas, which asserted right Appellee duly contested. After trial and hearing on April 2. 1959 the trial court refused to recognize such right which Appellant had urged. Appellant duly appealed from such judgment of said trial court, and in connection with such appeal Appellant and Appellee stipulated that "the only issue involved * * * was the issue of whether the provisions of the federal statutes entitled said Defendants (Appellants) to have said Plaintiff's (Appellee's) action against them transferred to the state court in Dallas County, Texas or whether state statutes on venue of such action were controlling." On December 9, 1959 the Austin Court of Civil Appeals entered judg-

ment sustaining Appellant's contention. The opinion of the Austin Court of Civil Appeals followed this Court's construction of the federal statute involved as it had been construed in *First National Bank of Charlotte v. Morgan*, 132 U. S. 141, 10 S. Ct. 37, 33 L. ed. 282 (1889).

Appellee duly applied to the Supreme Court of Texas for a writ of error, which application was granted by the Supreme Court of Texas. On November 23, 1960 the Supreme Court of the State of Texas entered its judgment reversing the judgment of the Austin Court of Civil Appeals and affirming the judgment of the trial court. The opinion of the Supreme Court of the State of Texas proceeded on the theory that the federal statute was merely permissive, that the state statute was controlling, and that what the Supreme Court of the United States had said about the federal statute in *First National Bank v. Morgan*, supra (1889) was mere dictum and not controlling. Appellant duly filed its motion for rehearing, and the judgment of the Supreme Court of the State of Texas denying Appellant's asserted federal right became final on December 21, 1960, when such motion for rehearing was overruled.

RAISING THE FEDERAL QUESTIONS

Appellant's initial pleading, a plea of privilege, clearly and expressly asserted the federal right claimed under the federal statute, 12 U. S. C. §94. Appellee's responsive pleading clearly raised the contention that the state statute rather than the federal statute was controlling. The

stipulation between Appellant and Appellee in connection with the appeal contained the agreement of the parties that the *only* issue involved was that of whether the federal statute or the state statute was controlling. The published opinion of the Austin Court of Civil Appeals showed that this was the *only* issue involved. The published opinion of the Supreme Court of the State of Texas showed that this was the only issue involved. The federal questions were presented at the earliest stage and never waived.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The right granted to national banks by the federal statute, 12 U. S. C. §94, is a valuable right which applies to actions against national banks whether brought in federal courts or in state courts. This statutory right is not merely permissive either in federal courts or in state courts. It has been passed on and upheld by the Supreme Court of the United States in the following cases: *Casey v. Adams*, 102 U. S. 66, 26 L. ed. 52 (1880); *First National Bank of Charlotte v. Morgan*, supra, the latter case being cited with approval in *Bank of America v. Whitney Central National Bank*, 261 U. S. 171, 43 S. Ct. 311, 67 L. ed. 594 (1922). The decisions in federal and state courts are thoroughly reviewed in *Monarch Wine Co. v. Butte*, 249 P. 2d 291 (Cal. App., 1952).

From 1864 to the present national banks have been highly important units of our banking system in this country. Problems of the extent to which they are governed and controlled by state laws have presented and will con-

tinue to present federal questions of substantial interest to the banking systems and general economy in this country. State legislatures cannot take away from national banks rights and immunities conferred on national banks by Congress.

This Court's decision in *First National Bank of Charlotte v. Morgan*, supra, decided in 1889, unequivocally characterized the right granted to national banks by the statute as an "immunity", an "exemption", and a "privilege". Notwithstanding this, however, some state courts have not followed the construction of the federal statute announced by this Court in the *Morgan* case in 1889. See the compilation of cases contained in an annotation in 86 A. L. R. 47 (1933). In the present case the Supreme Court of the State of Texas has held what this Court said in the *Morgan* case was mere dictum and not controlling. Relying on Section 4 of the Act of July 12, 1882 (22 Stat. 163), which was not applicable in the *Morgan* case, the Michigan Supreme Court thought that this Act of July 12, 1882 did repeal in whole or in part the earlier federal statute on venue, *Levitan v. Houghton Nat. Bank*, 174 Mich. 566, 140 N. W. 1019 (1913). A current decision by this Court on these questions is in the public interest and is of great importance to national banks concerned with their rights in state court proceedings against them.

Question One

In *First National Bank of Charlotte v. Morgan*, supra, this Court described the right granted by the federal stat-

ute here involved as an "exemption" granted by Congress and as an "immunity from suit", and concluded if such exemption or immunity from suit had been claimed in the trial court it "must have been recognized." These statements and conclusions were not mere dictum.

Question Two

The provisions of the federal statute, 12 U. S. C. §94, are mandatory and not merely permissive. *First National Bank of Charlotte v. Morgan*, supra; *Buffum v. Chase Nat. Bank of City of New York*, 192 F. 2d 58 (7th C.C.A., 1951, certiorari denied in 242 U. S. 994, 1952). In the present case the Supreme Court of Texas based its conclusion that the federal statute in question was merely permissive on the North Carolina case of *Curlee v. National Bank*, 121 S. E. 194 (N. C., 1924). That North Carolina case, decided in 1924, followed earlier New York cases including *Cooke v. State Nat. Bank*, 50 Barb. 339 (1867), affirmed in 52 N. Y. 96 (1873). In *Raiola v. Los Angeles First Nat. Trust & Savings Bank*, 233 N. Y. S. 301, decided in 1929, the New York court on the basis of the decision of the Supreme Court of the United States in *First National Bank of Charlotte v. Morgan*, supra, decided after the earlier New York cases, reversed the earlier New York cases on this question. To hold that the federal statute is merely permissive is to hold that it is meaningless. The right under it is not an exemption or immunity if a court can recognize it or not as it sees fit.

Question Three

By its terms the provisions of 12 U. S. C. §94 apply to actions and proceedings in federal courts and in state courts. In *First National Bank of Charlotte v. Morgan*, supra, this Court proceeded on the assumption that the statute did apply to an action against a national bank in a state court in North Carolina. The conclusion of the Supreme Court of the State of Texas in the present case to the effect that "this is a matter where the state is exercising powers wholly within the domain of state interest, and is, therefore, insulated from federal judicial review as well as from the application of federal venue statutes" overlooks completely the fundamental premise that Congress could have provided that actions against national banks could be brought only in federal courts. *First National Bank v. Fellows Ex Rel. Union Trust Co.*, 244 U. S. 416, 37 S. Ct. 734, 61 L. ed. 1233 (1916). The theory that the federal statute has no application to actions in state courts, that states can legislate as to national banks without reference to the federal nature of such banks and the express federal statutes relating to them, and that such state enactments are "insulated from federal judicial review, must be based on a misconception as to the relations between state legislatures and Congress insofar as national banks are concerned. If the federal statute is otherwise applicable, it cannot be changed by a state statute.

CONCLUSION

This appeal brings before this Court substantial federal questions of vital interest to all national banks and to the general public insofar as actions and proceedings against national banks are concerned. This Court has not directly considered these federal questions since 1889, and subsequent state court decisions have created areas of doubt. The questions presented are so substantial as to require plenary consideration with briefs on the merits and oral argument for their resolution.

Respectfully submitted,

MARVIN S. SLOMAN,

HUBERT D. JOHNSON,

Of Carrington, Johnson & Stephens,
1700 Mercantile Bank Building,
Dallas 1, Texas,
Attorneys for Appellant.

PROOF OF SERVICE

I, Marvin S. Sloman, one of the attorneys for Mercantile National Bank at Dallas, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 12 day of May, 1961, I served copies of the foregoing Jurisdictional Statement on the Appellee by depositing the same in a United States mail box, with first class postage prepaid, addressed to counsel of record for Appellee at the following post office addresses:

Cecil C. Rotsch
P. O. Box 13
Austin, Texas

Keith, Mehaffy, McNicholas & Weber
Kaufman Trust Building
Beaumont, Texas

Cureton & Lanham
401 Professional Building
Waco, Texas

Marvin S. Sloman

MARVIN S. SLOMAN,
1700 Mercantile Bank Building,
Dallas 1, Texas,
Counsel for Appellant.

APPENDIX A

Opinion of the Supreme Court of the State of Texas

C. H. Langdeau, Receiver for I. C. T. Ins. Co., Petitioner,

v.

Republic National Bank of Dallas, Respondent.

C. H. Langdeau, Receiver for I. C. T. Ins. Co., Petitioner,

v.

Mercantile National Bank at Dallas, Respondent.

Nos. A-7728, A-7729.

Supreme Court of Texas.

Nov. 23, 1960.

Rehearing Denied Dec. 21, 1960.

Cecil C. Rotsch, Austin, Keith, Mehaffy, McNicholas & Weber, Beaumont, Cureton & Lanham, Waco, for C. H. Langdeau.

Dan Moody, Austin, Leachman, Gardere, Akin & Porter, Dallas, for Republic Nat. Bank of Dallas.

Carrington, Johnson & Stephens, Dallas, for Mercantile Nat. Bank at Dallas.

SMITH, Justice.

These venue cases present but a single question of law which may be disposed of in one opinion.

[1] The question presented is: Does Title 12 U.S.C.A. § 94,[1] give a national bank, regardless of the provision of the Texas Venue Statutes, especially the provisions of Article 21.28, Section 4(f)[2] of the Insurance Code, the right to have an action against it tried in the county of its domicile?

The Court of Civil Appeals in its opinion reported in Vol. 331 S. W. 2d 349, answered the question in the affirmative. The opinion, in effect, sustained the bank's position: (1) that federal statutes are paramount on matters affecting such federal instrumentalities as national banks, and that state statutes in conflict therewith must yield to the federal statutes, and (2) that the decisions of United States courts involving the construction of federal statutes relating to national banks are binding on state courts and that the state venue statutes are not applicable.

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[1] "Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located having jurisdiction in similar cases. Sec. 94, Title 12, U. S. Code, annotated.

"The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.

"All national banking associations shall, for the purpose of all other actions by or against them, be deemed citizens of the States in which they are respectively located. 28 United States Code, Annotated, Section 1348."

[2] "New Lawsuits. The court of competent jurisdiction of the county in which the delinquency proceedings are pending under this Article shall have venue to hear and determine all actions or proceedings instituted after the commencement of delinquency proceedings by or against the insurer or receiver."

The record reveals that delinquency proceedings were filed in the 98th District Court against I.C.T. Insurance Company and petitioner, C. H. Langdeau, was appointed receiver under the provisions of Section 2(a) of Article 21.28, supra, of the Insurance Code.

Thereafter, petitioner instituted this suit against a number of defendants, including the two respondent national banks, charging a conspiracy to defraud the insurance company, its policyholders, stockholders, and creditors, and sought a judgment against all defendants, jointly and severally. In effect, it is a suit for the recovery of assets of the delinquent insurance company. In this connection, in determining the venue question here involved, we are not passing upon the merits, and nothing said herein shall be so construed.

[2] The respondents' pleas of privilege to be sued in Dallas County, Texas, the county of the residence and location of each banks, were overruled by the trial court, but sustained by the Court of Civil Appeals as already stated. We deem it necessary to take note of the respondents' challenge to the jurisdiction of this court, which is to the effect that when, as here, a conflict of decisions is made the basis of Supreme Court jurisdiction, it is essential that such conflict appear on the face of the opinions themselves, and that petitioner has failed to meet such test. This test is laid down in the case of State v. Wynn, 157 Tex. 200, 301 S. W. 2d 76. We believe that the decision in the present case is sufficiently in conflict with the decision in the

case of Guerra v. Lemburg, Tex. Civ. App., 22 S. W. 2d 336, er. dism. to give this court jurisdiction.

In the case of Guerra v. Lemburg, supra, the Commercial State Bank of Sinton, San Patricio County, Texas, and the City National Bank of Corpus Christi, Nueces County, Texas, were sued in Hidalgo County, the residence of a co-defendant. The National Bank of Corpus Christi filed a plea of privilege to be sued in its home county claiming, as the respondents claim in the present case, that under the provisions of 12 U.S.C.A. § 94, a national bank can only be sued in a state court in the county of its domicile, regardless of the fact that under the provisions of the Texas venue statutes, the suit could have been brought in Hidalgo County where alleged fraudulent representations were made. The trial court sustained the plea of privilege. The Court of Civil Appeals reversed, holding that the bank was not entitled to a change of venue,[3] thereby holding directly opposite to the holding in the present case. The

[3]Quote from Guerra v. Lemburg, supra [22 S. W. 2d 337]:

"In * * * (28 U.S.C.A. § 41(16) [1948 Rev., 28 U.S.C.A. § 1348]), national banks are declared to be, for the purposes of all other actions except those enumerated, against or by them, for property, * * *, and suits in equity, citizens of the states in which they are respectively located. Being citizens of a state carries with such citizenship the burdens, as well as the privileges, pertaining to it. This is provided in * * * (12 U.S.C.A. § 24(4), as to national banks, where they are given the power 'to sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons.'

"In conferring jurisdiction generally upon state courts in regard to suits against national banks, * * * the provision in question is embodied * * * under the head 'Usurious Interest' (12 U.S.C.A. §§ 86, 94), showing conclusively that no provision preventing national banks from being sued in state courts, under any and all other circumstances, in any other than the county of the domicile is in existence. The provision has reference alone to actions for penalties arising from usuary, which is legislated against in the paragraph cited. The law does not apply to any other class of actions, and in all other suits national banks are citizens of the state in which they are located, clothed with the privileges of citizenship, and subject to any burdens and liabilities attached thereto."

Court of Civil Appeals in the present case quotes at length from the case of Monarch Wine Company v. Butte, 1952, 113 Cal. App. 2d 833, 249 P. 2d 291. That case refers to the case of Guerra v. Lemburg, supra, and the case of Leonardi v. Chase National Bank of City of New York, 2 Cir., 81 F. 2d 19. The Court of Civil Appeals cites this latter case in support of its holding that the federal statute controls. The Monarch Wine Company case, supra, held that the decision in the Guerra v. Lemburg case, supra, is contrary to the decision in Leonardi, supra, and the opinion of the Court of Civil Appeals in the present case holds that the Guerra case was erroneously decided, and that it agrees with the Leonardi case. We are convinced that the specific conflicting holdings in the two cases create a jurisdictional conflict. The holdings are so far upon the same state of facts that the decision of one of the cases is necessarily conclusive of the decision in the other. See Dockum v. Mercury Ins. Co., 134 Tex. 437, 135 S. W. 2d 700. Accordingly, the application for writ of error presents a case within the jurisdiction of this court.

We now proceed to a decision of the principal question. We have concluded to reverse the judgment of the Court of Civil Appeals and affirm that of the trial court for the reasons now to be stated.

If, under federal decisions, United States Revised Statute § 5198, 12 U.S.C.A. § 94, is applicable here, then all state statutes in conflict therewith must yield. See Van Reed v. Peoples National Bank, 198 U. S. 554, 25 S. Ct. 775, 49 L. Ed. 1161; Citizens National Bank of Stamford

v. Stevenson, Tex. Com. App., 231 S. W. 364. We agree that the issue here also is not one of jurisdiction, but is one as to proper venue, or proper locality where a state statute has fixed venue. However, we do not agree with respondents' contention that the proper venue of this action is determined by Section 94 of 12 U.S.C.A., supra. See Casey v. Adams, 1880, 102 U. S. 66, 68, 26 L. Ed. 52. The proper venue of this case is determined by Article 21.28, § 4(f), supra, which provides, in effect, that the court of competent jurisdiction of the county in which the delinquency proceedings are pending shall have venue to hear and determine all actions or proceedings instituted after the commencement of the delinquency proceedings.

[3] It was not the intention of the Congress in adopting 12 U.S.C.A. § 94, supra, that it was to control with respect to an action against a national bank commenced in a state court, especially where such action was commenced in a district court located in the county designated by state statute to have venue. This is a matter where the state is exercising powers wholly within the domain of state interest, and is, therefore, insulated from federal judicial review as well as the application of federal venue statutes. It is unnecessary to our decision to determine whether this particular action is local or transitory in nature. Texas has adopted Article 21.28, supra. This is the statute which is applicable to the action here involved. In 92 C.J.S. Venue § 7, p. 678, it is said: "In many jurisdictions statutory enactments applicable to actions whether transitory or local, have rendered the distinction between these classes of

actions of minor importance, or have done away with it entirely." Therefore, whether our action properly belongs to one class or the other, it, nevertheless, must be instituted under the conditions prescribed in the state statute. See State ex rel. Gardner v. Hall, 282 Mo. 425, 221 S. W. 708.

However, the courts are in conflict on the question as to whether an action can be brought against a national bank in a state court outside of the county in which the bank is located. U. S. Revised Statutes § 5198, 12 U.S.C.A. § 94, supra, has been differently construed by state courts. A majority of the state courts have held that the provisions of 12 U.S.C.A. § 94, quoted above, do not deprive the state courts of jurisdiction of an action against a national bank located and doing business in another state, or in a county or city other than that in which the action is brought. See the annotation "National Bank as subject to suit outside county of its resident," 86 A.L.R. 47. The courts so holding apparently proceeded on the theory that the use of the word "may" in the statute renders it permissive and not mandatory, and, hence, national banks may be sued in any state court of competent jurisdiction, even though the court is outside of the county in which the bank is located. Paton's Digest of Legal Opinions, edited and compiled by the American Bankers Association, under the supervision and direction of Thomas B. Paton, Assistant General Counsel of the Association, Vol. II, p. 2407 et seq., recognizes the rule announced in the case of Curlee v. National Bank of Fayetteville, 1924, 187 N.C. 119, 121 S.E. 194, 195, to be against the contention of the banks in the present case.

Paton correctly analyzes the Curlee case: "In that case it appears that the plaintiffs, resident of Mecklenburg County, North Carolina, sued the defendant, a national bank located in Cumberland County, North Carolina, for alleged damages to the plaintiffs; financial and social standing arising from a wrongful attachment of the plaintiffs' property in Cumberland County. The action was brought in the superior court of Mecklenburg County. The bank thereupon entered a special appearance, asking for a removal of the case to the superior court of Cumberland County, on the principal ground that, under the federal statute, quoted above, a national bank without its consent is not suable in any state court other than a state court located in the county in which it has its place of business. The court, pointing out that the authorities are conflicting, ruled that the defendant bank's contention was not sustainable.

"The following cases hold that such provisions are permissive, not mandatory, and do not deprive the state courts of jurisdiction of an action by or against national bank located or doing business in another state, or in a district or county other than that in which the action is brought; Fresno Nat. Bank v. Superior Ct., 83 Cal. 491, 24 P. 157; Continental Nat. Bank v. Folsom, 78 Ga. 449, 3 S.E. 269; Cooke v. State Nat. Bank, 50 Barb. (N.Y.) 339, affirmed in 52 N.Y. 96, 11 Am.Rep. 667; Robinson v. National Bank, 81 N.Y. 385, 37 Am.Rep. 508; Talmage v. Third Nat. Bank, 91 N.Y. 531; Lee v. Citizens' Nat. Bank, 5 Ohio Dec. Reprint 21; Holmes v. National Bank, 18 S.C. 31, 44 Am. Rep. 558; Montpelier First Nat. Bank v. Hubbard, 49

Vt. 1, 24 Am.Rep. 97. See also, Levitan v. Houghton Nat. Bank, 174 Mich. 566, 140 N.W. 1019; Cassat v. First National Bank of West New York, 1931, 9 N.J.Misc. 222, 153 A. 377."

The rule, as expressed in the above decisions, is sound and is hereby approved and followed. Assuming, as we must in this venue case, that both banks are necessary parties, what would be the result if the two banks (or ten banks) had been domiciled in different counties, and each bank, whether two or ten, had filed a plea of privilege under the federal statute? To invoke the rule insisted upon by the respondents would, in effect, deny the petitioner the right to maintain the suit alleged in his petition. See County of Okeechobee v. Florida National Bank, 1933, 112 Fla. 309, 150 So. 124.

[4] Among the cases relied upon by respondents is that of First National Bank of Charlotte v. Morgan, 1889, 132 U. S. 141, 10 S. Ct. 37, 33 L. Ed. 282. In this case the court definitely stated that the federal venue statute in force at that time, § 57 of the National Bank Act, 13 Stat. 99, which was practically the same as 12 U.S.C.A. § 94, quoted above, was mandatory rather than permissive. However, the statement was dicta, and is, therefore, not binding on this court.

One of the principal cases relied upon by the respondents, and cited by the Court of Civil Appeals, is that of Leonardi v. Chase National Bank, 2 Cir., 81 F. 2d 19, 22, certiorari denied 298 U. S. 667, 56 S. Ct. 941, 80 L. Ed. 1398. The national bank involved had its principal and central office in the Southern District of New York, and with a branch

office in Brooklyn in the Eastern District of New York. The court held that the bank's principal place of business was established in the Southern District, and not in the Eastern District, the location of its branch bank; that, therefore, the court in the Eastern District was without jurisdiction. The court in so holding said: "* * * To agree with the interpretation of Sections 51 and 52 of the Judicial Code, as amended (28 U.S.C.A. §§ 112, 113 [1948 Rev., 28 U.S.C.A. §§ 1391, 1392, 1401, 1693, 1695]), in Galveston, H. & S. A. R. Co. v. Gonzales * * * the district in which the national bank has its principal place of business and which contains the place recited in its charter * * * should be taken as the proper district for suits against a national bank." The case of Galveston, Harrisburg & San Antonio Railway Company v. Gonzales, 151 U. S. 496, 14 S. Ct. 401, 404, 38 L. Ed. 248, cited in the Leonardi case, supra, as the basis for its holding, was a suit against a railway corporation. There the contention was made that a railway corporation should be considered an inhabitant of the place in which its public office is located, and that the public office of a railroad corporation shall be considered the domicile of such corporation, citing Article 4120, 2 Sayles Texas Civil Statutes. On the other hand, the contention was made that suits against a railway corporation may be brought in any county through or into which the railway of such corporation extends or is operated. The court in holding that the venue of the suit was in the county of its domicile said: "* * * *but it is manifest*

that, so far as the federal courts are concerned, this provision (Article 1195, Texas statute) is subordinate to the first section of the act of 1888, requiring civil suits to be brought within the district of which the defendant is an inhabitant." (Emphasis added.) Clearly, the court in both the Leonardi and the railway corporation cases, was limiting the scope of its holding to transitory actions commenced against national banks and railway corporations in a federal court.

[5] These case are not decisive of the paramount question confronting us here. Of course, a state by legislative enactment cannot deprive a federal instrumentality of one of its constitutional or statutory rights, nor can a federal right be defeated under the name of state practice. The respondent banks have been deprived of no constitutional or statutory rights by the bringing of this action in Travis County.

That the Congress has never intended to exempt national banks from suits in state courts, established elsewhere than in the county or city in which such banks were domiciled, and that the paramount purpose was to limit the effect of the Act to action against national banks commenced in a federal court is demonstrated by its action in amending the Judiciary Act. See Title 28, Judiciary and Judicial Procedure, 80th Cong. 2d Sess., Vol. 62, part 1, p. 869, Public Laws, U. S.Code Cong.Service 1948, pp. A165-A198. When the Act was adopted, it purportedly repealed

Sec. 4, Chapter 290, 22 Stat. 163,[4] which had been a part of the statute since July 12, 1882. A comparison of the provisions of Section 1348, supra, with the provisions of Section 4, Chapter 290, indicates that the former did not actually repeal the latter, but instead reinacted the statute, but in different language. The enactment of Section 4, c. 290, in 1882, and the rewriting of the Judiciary Act in 1948, did not mean the repeal of the section of the Banking Act, now designated as Section 94, supra, but indicated the intention of the Congress to limit the Act so as to apply only to actions against a national bank commenced in a federal court.

The judgment of the Court of Civil Appeals is reversed and the judgment of the trial court is affirmed.

CALVERT, J., concurs in the result.

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[4] "The jurisdiction for suits hereafter brought by or against any association, established under any law providing for national-banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdictions for suits by or against banks not organized under any law of the United States which do or might do banking business where such national-banking associations may be doing business when such suits may be begun: And all laws or parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed."

APPENDIX B

Opinion of the Austin Court of Civil Appeals

NO. 10,711
AND
NO. 10,712

MERCANTILE NATIONAL BANK AT DALLAS
AND
REPUBLIC NATIONAL BANK OF DALLAS,
APPELLANTS

v

C. H. LANGDEAU, RECEIVER, APPELLEE

FROM DISTRICT COURT OF TRAVIS COUNTY,
98TH JUDICIAL DISTRICT, NO. 110,917,
HONORABLE D. B. WOOD, JUDGE

These are venue cases in which the parties have stipulated to the controlling facts and issues.

The controlling facts are that the appellants, Mercantile National Bank at Dallas and the Republic National Bank of Dallas, are, and were at all material times, national banking associations organized and existing under the laws of the United States of America (National Bank Act) with each having its principal and only place of business in Dallas, Dallas County, Texas, and appellee, C. H. Langdeau, Receiver (and his predecessors),[1] was at all such times the duly

[1]The history of prior receivers is stipulated but is not material.

appointed, qualified and acting Receiver for and had taken charge of all the assets of ICT Insurance Company in receivership proceedings in the 98th District Court of Travis County, a court of competent jurisdiction, and who had been designated as Liquidator for such company by the Board of Insurance Commissions of Texas and who, under the laws and orders of the 98th District Court was authorized to maintain this action for the alleged wrongful acts committed by appellants against ICT Insurance Company.[2]

The question of law presented was stipulated to be:

> "The only issue involved in said plea of privilege hearing was the issue of whether the provisions of the federal statutes entitled said Defendants to have said plaintiffs' action against them transferred to the state court in Dallas County, Texas, or whether state statutes on venue of such action are controlling."

The federal statutes referred in this stipulation are, and we quote them:

> "Actions and proceedings against any association under this chapter may be had in any district or territorial court of the United States held within the district in which such association may be established, or in any state, county or municipal court in the county or city in which said association is located having jurisdiction in similar cases." Sec. 94, Title 12, U. S. Code, Annotated.[3]

> "The district courts shall have original jurisdiction of any civil action commenced by the United States,

[2]The detailed nature of this suit is not material to these appeals except to state that it is a suit for damages based on an alleged conspiracy.

[3]This section is a part of Chapter 2 of Title 12 of the United States Code, Annotated. Title 12 is entitled: "Banks and Banking." Chapter 2 of said Title, in which is included Section 94, is entitled "National Banks," Section 94 is entitled "Venue of Suits."

or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.

"All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located. 28 United States Code, Annotated, Section 1348.[4]

The State statute referred to is Section 21.28, Sub-section 4(f) of the Texas Insurance Code, which we quote:

"New Lawsuits. The court of competent jurisdiction of the County in which the delinquency proceedings are pending under this Article shall have venue to hear and determine all actions or proceedings instituted after the commencement of delinquency proceedings by or against the insurer or receiver."

There can be no doubt that if venue of these cases is fixed in Dallas by Federal laws the State statute is of no avail. We quote from Van Reed v. People's National Bank, 198 U. S. 554, 25 S. Ct. 775:

"National banks are quasi-public institutions, and, for the purpose for which they are instituted, are national in their character and within constitutional limits subject to the control of Congress, and are not to be interfered with by State legislative or judicial

[4]This Section is a part of Chapter 85 of Title 28 of the United States Code, Annotated. Title 28 is entitled: "Judiciary and Judicial Procedure." Chapter 85 of said Title, in which is included Section 1348 is entitled: "District Courts, Jurisdiction." Section 1348 is entitled: "Banking Association as Party."

> action, except so far as the law making power of the government may permit."

In Citizens National Bank of Stanford v. Stevenson, 231 S. W. 364, Tex. Comm. of Appeals (opinion by Judge Powell) it is stated:

> "It is well settled that, if the federal and state provisions upon any point with reference to national banks, conflict, the state rules must yield."

Mr. Justice Hart, in Paddock v. Siemoneit, 147 Tex. 571, 218 S. W. 2d 428, stated this rule for construing Federal statutes:

> "In determining the meaning of Federal laws, this Court is controlled by the decisions of the Supreme Court of the United States. * * * In this instance, however, there does not appear to be any decisions by the United States Supreme Court which is directly in point, and we have to try to arrive at the meaning of the statute from that Court's opinions in more or less analogous cases."

We will now undertake a determination of the question presented from the decided cases of the United States Supreme Court either directly in point or "from that Court's opinions in more or less analogous cases."

For a better understanding of these opinions we give the following condensed history of Section 94 of Title 12, supra:

The Act of June 3, 1864, known as the National Bank Act (13 Stat. 99) contained the following as a part of Section 57:

> "Suits, actions, and proceedings against any association under this Act, may be had in any circuit, district, or territorial court of the United States held

within the district in which such association may be established, or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases."

In the Revised Statutes of the United States, enacted in 1873, there was no statute comparable to Section 57 of the National Bank Act of June 3, 1864. This omission was remedied by the Act of February 18, 1875 (18 Stat. 316, 320) which added a statute identical with present Section 94, Title 12.

When the corrective legislation of 1875 was enacted however it was as an amendment, by addition, to Section 5198 of the 1873 revision of the United States statutes, which Section dealt only with penalties for charging usurious interest. These provisions were separated in the United States Code adopted June 1926 and the provision relating to penalties was given Section number 86 and the provision as to venue was given Section number 94.

No other changes were or have been made in Section 94.

The predecessor of Section 94 was construed by the United States Supreme Court in First National Bank of Charlotte, North Carolina v. Morgan, 132 U. S. 141, U. S. S. Ct. Rep. 282 (1889). There a national bank was sued in a State Court in a county other than the one in which it was located. No objection on this account was made until the case reached the State Supreme Court. In holding that the privilege of being sued in its home county could be waived by the bank

the United States Supreme Court, Mr. Justice Harlan speaking, said:

"This exemption of national banking associations from suits in state courts, established elsewhere than in the county or city in which such associations were located, was, we do not doubt, prescribed for the convenience of those institutions, and to prevent interruption in this business that might result from their books sent to distant counties in obedience to process from state courts. First Nat. Bank of Bethel v. Pahquioque Nat. Bank, 81 U. S. 14 Wall. 383, 394 (20:840, 842); Crocker v. Marine Nat. Bank, 101 Mass. 240. But, without indulging in conjecture as to the object of the exemption in question, it is sufficient that it was granted by Congress, and if it had been claimed by the defendant when appearing in the Superior Court of Cleveland County, must have been recognized. The defendant did not, however, choose to claim immunity from suit in that court. It made defense upon the merits, and, having been unsuccessful, prosecuted a writ of error to the Supreme Court of the State, and in the latter tribunal, for the first time, claimed the immuntiy granted to it by Congress. This was too late. Considering the object as well as the words of the statute authorizing suit against a national banking association to be brought in the proper state court of the county where it is located, we are of opinion that its exemption from suits in other courts of the same State was a personal privilege that it could waive, and which, in this case, the defendant did waive, by appearing and making defense without claiming the immunity granted by Congress. No reason can be suggested why one court of a State, rather than another, both being of the same dignity, should take cognizance of a suit against a national bank, except the convenience of the bank. And this consideration supports the view that the exemption of a national bank from suit in any state court except one of the county or city in

which it is located is a personal privilege, which it could claim or not, as it deemed necessary."

In Cope v. Anderson, 331 U. S. 461, 67 S. Ct. 1340 (1947) a receiver of an insolvent Kentucky national bank brought suit in Federal District Courts in Ohio and Pennsylvania to enforce stockholders' assessments against Ohio and Pennsylvania stockholders. The question was whether Kentucky statutes of limitation or limitation statutes of Ohio and Pennsylvania controlled. In holding that the cause of action arose in Kentucky and its statutes applied, the Court, Mr. Justice Black speaking, stated:

"Many provisions of federal law make national banks, in important aspects, peculiarly local institutions. See 12 U.S.C.A., Sections 30, 33, 34a, 36, 51, 62, 72, 4 F.C.A., Title 12, Sections 30, 33, 34a, 36, 51, 62, 72. For jurisdictional purposes a national bank is a 'citizen' of the State in which it is established or located, 28 U.S.C.A., Sec. 51(16), 7 F.C.A. Title 28, Sec. 41(16), and in that district alone can it be sued. 12 U.S.C.A., Sec. 94, 4 F.C.A. Title 12, Sec. 94."

The one United States Supreme Court case upon which appellees rely is Casey, Receiver v. Adams, 102 U. S. 68, 26 L. Ed. 52 (1880).[5] There proceedings were taken against a national bank in a State court in a parish other than the one in which it was located, in or as a result of a suit to foreclose a mortgage on land. The suit was brought in and

[5] Appellants do cite and quote the following from Bank of America v. Whitney Central National Bank, 261 U. S. 171, 67 L. Ed. 594:

"Whether a national bank could under any circumstances, be subjected, without its consent, to a suit in a state or district other than that in which it is authorized to locate its banking house, we have no occasion to consider in this case."

the proceedings held in the parish in which the land was situated. The bank objected that it could be sued only in the county of its location. In an opinion delivered by Mr. Chief Justice Waite, the Court held:

> "The federal question in this case is, whether a national bank can be sued in a state court in a local action in any other county or city than that where the bank is located. By sec. 5198, R.S., it is provided that 'Suits, actions and proceedings against any association under this title (the National Banks) may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases.' This, we think, relates to transitory actions only, and not to such actions as are by law local in their character. Section 5136 subjects the banks to suits at law or in equity as fully as natural persons, and we see nowhere in the Banking Act any evidence of an intention on the part of Congress to exempt banks from the ordinary rules of law affecting the locality of actions founded on local things. The distinction between local and transitory actions is as old as actions themselves, and no one has ever supposed that laws which prescribed generally where one should be sued, included such suits as were local in their character, either by statute or the common law unless it was expressly so declared. Local actions are in the nature of suits in rem, and are to be prosecuted where the thing on which they are founded is situated. To give the Act of Congress the construction now contended for, would be, in effect, to declare that a national bank could not be sued at all in a local action where the thing about which the suit was brought was not in the judicial district of the United States within which the bank was located. Such a result could never have been contemplated by Congress.

> "The proceeding in this case was clearly local in its nature. It related to property in the Parish of La Fourche, which had been seized and sold under process from the district court of that parish. The proceeds of the sale were in that court, and could not be distributed until 'a conflict of privileges' arising between creditors was settled."

We agree with appellee that Art. 21.28, Section 4(f), V.A.C.S. creates a statutory local action. We do not agree that such actions are necessarily local in nature as that term was used by the Supreme Court in Casey against Adams. This action, a suit for damages for alleged malfeasance, is by no stretch of the imagination local in nature or in character. Morris v. Mo. Pac. Ry. Co., 78 Tex. 17, 14 S. W. 228; Miller v. Howell, 234 S. W. 925, Ft. Worth Court of Civil Appeals.

This, to our satisfaction, distinguishes Casey against Adams and prevents it from being a case directly in point. We are convinced, too, that Casey does not represent the law as reflected by subsequent United States Supreme Court decisions, supra. Those decisions, in our opinion, fix venue of actions against national banks in State courts only in the county in which the bank is located, in accordance with the plain wording of Section 94.

Appellee does not discuss the Federal District and Circuit Court decisions cited by appellants and disposes of them by saying:

> "Decisions by the U. S. Circuit Courts and decisions by the U. S. District Courts in suits filed in Federal Courts have no bearing and are unrelated to the ques-

> tion because State Venue Statutes do not control or purport to govern the venue of such suits."

Appellee does, however, cite nine State cases,[6] each from a separate State in support of its position. These cases (one or more) are to the effect that Section 94 applies (1) only in usury cases (2) in transistory cases or (3) that it is permissive (4) that it was repealed by Section 1348, supra, or (5) as stated by the New Jersey Supreme Court in Cassatt:

> "We are inclined to think that the direct application of the statute is to jurisdiction and that it is not in such potent control of venue as to be imperative in the present case."

The Federal District and Circuit Court cases cited by appellants are listed below[7] as are the State Court decisions upon which they rely.[8]

If the question here presented has not been decided by the United States Supreme Court or if the meaning of Section 94 cannot be gleamed from its opinions in more or less analog-

[6]"Texas: Guerra v. Lemburg, 22 S. W. 2d 336 (1929) (Writ Dis.); New York: Chafee v. Glen Falls National Bank & Trust Co., 123 N.Y S. 2d 635 (1953), Affirmed 128 N.Y.S. 2d 539; Appeal to Court of Appeals denied 129 N.Y.S. 2d 237; Michigan: Levitan v. Houghton Bank, 140 N. W. 1019, 174 Mich. 566 (Sup. Ct. 1913); Minnesota: DeCock v. O'Connell, 246 N. W. 885, 86 A.L.R. 41 (Sup. Ct. 1933); North Carolina: Curlee v. Bank, 187 N. C. 119, 121 S. E. 194 (Sup. Ct. 1924); Wisconsin: Brust v. Bank, 184 Wisc. 15, 198 N. W. 749 (Sup. Ct. 1924); New Jersey: Cassatt v. Bank, 9 N. J. Misc. Rep. 222, 153 A. 377 (Sup. Ct. 1931); Alabama: Bank v. Alston, 165 So. 241 (Sup. Ct. 1936); California: Fresno National Bank v. Superior Court 83 Cal. 491, 24 P. 157 (Sup. Ct. 1890)."

[7]Buffum v. Chase National Bank, 192 F. 2d 58, Certiorari denied, 242 U. S 994, 72 S. Ct. 558; International Refugee Organization v. Bank of America, 86 F. Supp. 884; Schmitt v. Tobin, 15 F. Supp. 35; Leonardi v. Chase National Bank, 81 F. 2d 19, 2d Cir., Certiorari denied, 298 U. S. 667.

[8]County of Okeechobee v. Florida Nat. Bank. 150 So. 124 (Florida, 1933); Monarch Wine Company v. Butte, 249 P. 2d 291 (Cal. 1952); Zarbell v. Bank of America Nat. Trust & Savings Association, 327 P. 2d 436 (Wash. 1958); Crofoot v. Giannini, 92 NYS 2d 191 (1949); Rabinowitz v. Kaiser-Frazer Corporation, 96 N.Y.S. 2d 638 (1950).

ous cases and if the question is an open one for this Court then we state that we have considered all State cases and Federal decisions from lower courts for their persuasiveness. Especially have we been impressed by the thorough treatment of the matter and the sound reasoning found in the Monarch Wine case from California and we quote the following from that opinion:

> "The federal cases interpreting section 94 seem to establish three propositions: (1) Where actions against a national bank are brought in a state court outside the state where it is located the action must be dismissed because there is no procedure for transferring the action from one state to another. See Schmitt v. Tobin, D. C., 15 F. Supp. 35, where an action brought in Nevada against a Caliorria national bank was dismissed. (2) Where the actions are brought in a federal court in a district other than that in which the bank is located the actions formerly were required to be dismissed as the federal law provided no procedure for transfer. See Leonardi v. Chase Nat. Bank of City of New York, 2 Cir., 81 F. 2d 19, where the court dismissed an action brought against a national bank in a federal court in a district other than that of the bank's residence. To the same effect, International Refugee Organization v. Bank of America, etc., D. C., 86 F. Supp. 884, and Buffum v. Chase National Bank of City of New York, 7 Cir., 192 F. 2d 58. Such a procedure has now been provided and the case would now be transferred to the proper district. Plaintiffs concede that the law as to these two propositions is as above stated. (3) Where the action is brought in a state court of a state in which the bank is located but not in the county of its location, and where state law has a procedure for change of venue, the action must not be dismissed, but upon application must be transferred to the county in which the bank is located.

"The New York courts since 1883 in dealing with the question of whether the statute in question is mandatory or permissive, have held it mandatory, saying, 'Where the meaning of a federal statute is to be ascertained, the decisions of the federal courts construing the statute are controlling on the state courts.' Raiola v. Los Angeles First Nat. Trust & Savings Bank, 133 Misc. 630, 233 N.Y.S. 301, 305; see also Crofoot v. Giannini, supra, 92 N.Y.S. 2d 191, and Rabinowitz v. Kaiser-Fraser Corporation, 198 Misc. 312, 96 N.Y.S. 2d 638. While these were cases dealing with actions against national banks whose residences were outside the state we can see no difference in the language or the effect of that portion of section 94 referring to suits not brought in the state of the bank's residence and those not brought in the county of its residence. Crocker v. Marine National Bank of New York, 101 Mass. 240, and Burns v. Northwestern Nat. Bank of Minneapolis, Minn., supra, 260 N.W. 253, held the same way as the cited New York cases.

"Guerra v. Lemburg, Tex. Civ. App., 22 S. W. 2d 336, contrary to the decisions in Leonardi v. Chase Nat. Bank of City of New York, supra, 81 F. 2d 19, Schmitt v. Tobin, supra, 15 F. Supp. 35, and Rabinowitz v. Kaiser-Fraser Corp., supra, 96 N.Y.S. 2d 638, held that section 94 applied only to actions for penalties for usury. Cassatt v. First Nat. Bank, 153 A. 377, N. J. Misc. 222, without discusing the federal cases on the subject and in spite of them, held section 94 applied to jurisdiction and not to venue.

"The language in Buffum v. Chase Nat. Bank of City of New York, supra, 192 F. 2d 58, at page 60, although the court was dealing with an action brought against a bank in a state other than that of its residence, applies here: 'The issue here then is not one of jurisdiction of the subject matter, but one as to the proper venue, the proper locality. Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, at page 168, 60 S. Ct. 153, 84 L. Ed. 167. It seems clear that the

proper venue, in the absence of waiver or consent, is determined by Section 94 of 12 U.S.C.A.'

"In spite of the above decisions of some state courts we believe (1) we are bound by the decisions of the United States courts on the interpretation of section 94; (2) those courts have held directly in the Charlotte and Casey cases as to suits brought in the wrong county of a state and indirectly in other cases dealing with suits brought in the wrong state or in the wrong federal district, that section 94 is mandatory. If it was intended that the national bank could be sued in any court of the state, it would have been sufficient for the section to state 'in any state, county or municipal court of the state in which the bank is located.' But the section said the action is to be brought in the 'court in the county or city' in which the bank is located. (3) The plain and logical reading of the section shows that there is no difference in meaning between the various portions of the section, and (4) defendant is entitled as a matter of right under section 94 to a change of venue to the county of its residence. Hence the order denying its motion for such change was erroneous."

Our opinion, based upon the decision of Circuit Court of Appeals in Leonardi (f.n. 7), with which we agree, is that the San Antonio Court in Guerra erroneously concluded that Section 94 applied only to actions for penalties arising from usury.

In our study of this case we have been struck by the difficulty encountered by courts in applying or construing a statute (Section 94) which to us is plain and unambiguous. While it was entangled with the usury provisions of the federal law, confusion was understandable.

Since the separation of Section 94 from the usury provisions of Title 12 (1926) we can find no tenable ground upon

which to construe a plain statute in any manner contrary to its express wording.

That this statute should be construed as merely permitting a national bank to be sued in the county of its location is to attribute to the Congress little knowledge of the law of venue. Both the common law and the Spanish law permitted suits to be maintained where the defendant resided[9] and such is the general rule of the States.[10]

The judgments of the Trial Court are reversed and these causes are remanded with instructions to render judgment sustaining appellants' pleas of privilege and to transfer these causes as to these appellants to any Civil District Court of Dallas County in accordance with the provisions of Rule 89, T.R.C.P.

Robert G. Hughes, Associate Justice

Reversed and Remanded with Instructions.
Filed: December 9, 1959.

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[9]Vol. 38, Tex. Law Review p. 36. Spanish Influence on the Texas Law by Joseph Webb McKnight.

[10]Vol. 92 C.J.S., Venue, Sections 4, 6, 7 and 82.

APPENDIX C

Judgment of the 98th District Court of Travis County, Texas in Case No. 110,917 Overruling Plea of Privilege of Mercantile National Bank at Dallas

"On this the 20th day of February, 1959, came on to be heard by agreement of the parties the plea of privilege of defendant, MERCANTILE NATIONAL BANK AT DALLAS, and the Court having heard the pleadings, evidence and argument of counsel is of the opinion that said plea of privilege should be overruled;

IT IS THEREFORE ORDERED, ADJUDGED and DECREED by the Court that the plea of privilege of MERCANTILE NATIONAL BANK OF DALLAS be, and same is hereby overruled, to which action of the Court said defendant in open court excepted and gave notice of appeal to the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin.

Dated, signed, and rendered this 2nd day of April, 1959.

D. B. Wood
Judge Presiding"

Judgment of the Austin Court of Civil Appeals in Cause No. 10,712

"THIS CAUSE came on to be heard on the transcript of the record and same being inspected, because it is the opinion of the Court that there was error in the judgment, IT IS THEREFORE considered, adjudged and ordered that the judgment of the trial court be and same is hereby reversed and the cause is remanded with instructions to render judgment sustaining appellants' plea of privilege and transfer this cause as to appellants to any Civil District Court of Dallas County in accordance with the provisions of Rule 89, T.R.C.P. It is FURTHER ordered that the appellee pay

all costs in this behalf expended and that this decision with a copy of the opinion herein delivered be certified below for observance."

Judgment of the Supreme Court of Texas in Cause No. A-7729

"This cause came on to be heard on writ of error to the Court of Civil Appeals for the Third Supreme Judicial District, and the original transcript and transcript showing the proceedings in the Court of Civil Appeals having been duly considered, because it is the opinion of the Court (Associate Justice Calvert concurring in the result) that there was error in the judgment of the Court of Civil Appeals, but no error in that of the District Court, it is therefore *adjudged, ordered* and *decreed* that the judgment of the Court of Civil Appeals be, and hereby is, reversed and set aside, and that the judgment of the District Court be, and hereby is, in all things affirmed.

"It is further ordered that respondent, Mercantile National Bank at Dallas, and the surety on its appeal bond, American Surety Company of New York, pay all costs in this cause expended and incurred in this Court and the Court of Civil Appeals; that petitioner, C. H. Langdeau, Receiver of I. C. T. Insurance Company, have and recover of and from the said Mercantile National Bank at Dallas, and surety, American Surety Company of New York, the costs by him expended and incurred in said courts, and that this decision be certified to the District Court of Travis County, Texas, for observance."

APPENDIX D

I. The Texas Statute Involved

Article 21.28 of the Insurance Code of Texas, as amended in 1955 (Acts 1955, 54th Leg., p. 737, ch. 267) is captioned "Liquidation, Rehabilitation, Reorganization or Conservation of Insurers." Section 4(f) thereof provides:

> "Sec. 4. Actions.
>
> "• • •
>
> (f) New Lawsuits. The court of competent jurisdiction of the county in which the delinquency proceedings are pending under this Article shall have venue to hear and determine all actions or proceedings instituted after the commencement of delinquency proceedings by or against the insurer or receiver."

II. The Federal Statute Involved

Title 12 of the United States Code, as codified in 1925, is captioned "Banks and Banking." Chapter 2 of said Title 12 of the United States Code is captioned "National Banks." Section 94 of said Title 12 of the United States Code, which is a part of said Chapter 2 thereof relating to "National Banks", provides:

> "§94. Venue of suits
>
> "Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases. R.S. §5158; Feb.

18, 1875, c. 80, §1, 18 Stat. 320; Mar. 3, 1911, c. 231, §291, 36 Stat. 1167."

This statutory provision was Section 57 of the Act of June 3, 1864. 13 Stat. 116-117. It was omitted in the Revised Statutes of 1873. The omission was corrected by the Act of February 18, 1875. 18 Stat. 320. The Act of March 3, 1911, 36 Stat. 1167, conferred the powers and duties of the circuit courts upon the district courts.